Office Supreme Court, U.S.
FILED
JAN 22 1958
JOHN T. FEY, Clerk

No. 737

IN THE

Supreme Court of the United States

October Term, 1957

IRENE SHERMAN,

Petitioner,

AGAINST

SAM SHERMAN and SAMUEL W. SIEGEL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SURROGATE'S COURT OF THE COUNTY OF NEW YORK, STATE OF NEW YORK

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IN THE

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OCTOBER TERM 1957

IRENE SHERMAN,

Petitioner,

AGAINST

SAM SHERMAN and SAMUEL W. SIEGEL,

Respondents.

Petition for Writ of Certiorari to the Surrogate's Court of the County of New York, State of New York

Petitioner, Irene Sherman, prays that a Writ of Certiorari issue to review the decree of the Surrogate's Court of the State of New York, County of New York, in the proceeding entitled:

"In the Matter of

The Judicial Settlement of the Account of Proceedings of SAMUEL W. SIEGEL as Executor of MOE SHERMAN, also known as MOSES SHERMAN, Deceased.

IRENE SHERMAN,

Objector-Appellant,

SAM SHERMAN,

Respondent.

In the Matter of

The application of IRENE SHERMAN for a determination as to the validity, construction, etc., and effect of disposition of property contained in the Last Will and Testament of MOE SHERMAN, Deceased.

IRENE SHERMAN,
Plaintiff-Appellant,

SAMUEL W. SIEGEL, As Executor, DAVID I. SHIVITZ, STATE TAX COMMISSION, STATE OF NEW YORK, JOAN CONSTANCE SHERMAN and VERNON BROS. INC.,
Respondents."

as affirmed by the Court of Appeals of the State of New York on the 3rd day of July, 1957, which judgment of affirmance of the Court of Appeals became the judgment of the Surrogate's Court by order dated the 19th day of August, 1957.

Decisions Below

This proceeding was commenced in the Surrogate's Court of New York County on objections raised by petitioner to a judicial settlement of the account of proceedings filed by Samuel W. Siegel as executor of the Estate of Moe Sherman, deceased. By order dated the 31st day of May, 1955, the Surrogate dismissed the objections and directed that the account of the executor be settled and approved. An appeal from this order was taken to the Appellate Division of the Supreme Court of the State of New York for the First Judical Department, and on June 5, 1956, the Appellate Division on questions of fact and law, modified the decision of the Surrogate's Court, and as so modified, the Surrogate's Court decree was unanimously affirmed.

Petitioner thereafter appealed to the Court of Appeals of the State of New York and on July 3, 1957, that Court unanimously affirmed the order of the Appellate Division without opinion. On October 21, 1957, petitioner moved in the Court of Appeals for leave to reargue the appeal. This motion was denied on October 24, 1957.

Jurisdiction

The order of affirmance of the Court of Appeals was entered on July 3, 1957. A timely application for rehearing was filed by the petitioner in that Court on the 21st day of October, 1957, but was denied on October 24, 1957. The jurisdiction of this Court is invoked under 28 U. S. Code, Section 1257.

Questions Presented

1. Whether petitioner has been deprived of the equal protection of the law as guaranteed by the 14th Amendment to the Constitution.

2. Whether petitioner has been deprived of due process of the law as guaranteed by the 14th Amendment to the Constitution.

Statutes Involved

The statutory provisions involved are Section 1257 of 28 U. S. Code, the 14th Amendment to the Constitution of the United States, Section 125 of the Decedent Estate Law of the State of New York. These are more specifically set forth in Appendix A, pp. 15-16.

Statement

Petitioner is the widow of one, Moe Sherman. Deceased, during his lifetime, entered into an agreement on November 8, 1945, with his brother Sam, pursuant to which it was agreed that upon the death of either, the survivor would own all of the issued and outstanding shares of stock of Sherman Bros. Inc. It was agreed further that the survivor, as such sole owner of the shares of stock, could at his option either liquidate the corporation or continue the operation thereof as a sole owner. If he decided to liquidate, then the estate of the deceased party was to receive its share of the money realized from the liquidation. In the event the survivor continued the business of the corporation as sole owner he was to pay to the estate of the deceased party a sum of money to be arrived at by an evaluation of the net worth of the corporation. The evaluation of the corporation was to be determined by Samuel W. Siegel, who was given sole authority under the agreement to fix said value. Samuel W Siegel was the accountant for the corporation. Since the death of decedent he has been the accountant for Sam Sherman.

Prior to the making of this agreement, Moe Sherman had executed a Will dated November 5, 1942, in which the same Samuel W. Siegel, together with the brother, Sam Sherman, were both designated as executors and trustees of the Will. On September 19, 1949, Moe Sherman died. Thereafter Sam Sherman, as surviving stockholder, decided to continue the operation of the corporate business as the sole owner. He refused to qualify as executor and waived his right to letters. The other executor, Samuel W. Siegel, did not so waive, and he accordingly became the sole executor of the estate of Moe Sherman, and the sole evaluator to determine the net worth of the corporation.

He thus placed himself in the irreconcilable position of evaluator, to determine the net worth of the corporation, half of which was to be paid to the estate which he, as executor of the estate would then receive on behalf of the estate. It is obvious that in this dual capacity, Samuel W. Siegel, as executor, could not file, on behalf of the estate objections to the determination of Samuel W. Siegel, the evaluator. Moreover, Section 125 of the Decedent Estate Law of the State of New York provides in part as follows:

> "The attempted grant to an executor or testamentary trustee or the successor of either, of any of the following enumerated powers or immunities shall be deemed contrary to public policy.
>
> * * * * *
>
> 2. The power to make a binding and conclusive fixation of the value of any asset for purposes of distribution, allocation or otherwise."

On the account which was submitted by the executor, he stated that he determined the net worth of Sherman Bros. Inc., to be $255,057.79, and that Sam Sherman who elected to continue the business as his own, was required to pay to the estate one half that sum, or $127,528.90, less a deduction of $25,000.00, for an insurance adjustment. Objector, Irene Sherman, expressed dissatisfaction with the findings made by the executor, and thereupon an independent firm of Certified Public Accountants was called in to make an independent audit and to determine the net worth of Sherman Bros. Inc. In the report submitted by the independent accountants, they evaluated the net worth of the business at a sum of $78,104.76 higher than the evaluation placed upon the business by the evaluator-executor. The Surrogate adopted the higher figure.

On cross-appeals to the Appellate Division of the Supreme Court, that Court reinstated the lower figure. This has been approved by the Court of Appeals. Petitioner, therefore, was placed in the position of being obliged to accept as residuary legatee of her deceased husband's estate a sum less than she would have been entitled to receive if the evaluator were one other than the executor. The diversity of interest coupled with the dual irreconcilable acts of the executor-evaluator with immunity and exemption from Section 125 of the Decedent Estate Law clearly indicates that petitioner has been deprived of due process of law as guaranteed to her by the 14th Amendment to the Constitution of the United States, and the Courts in failing to follow the law prescribed by the Legislature in Section 125 (*supra*) have failed to give petitioner the equal protection of the law to which she is entitled.

Reasons for Granting of the Writ

This case involves the fundamental issue whether the petitioner has been deprived of due process as guaranteed by the 14th Amendment to the Constitution of the United States, by reason of the executor-evaluator's actions in his dual conflicting capacity and whether in the condoned furtherance of this dual capacity contrary to law, the petitioner has been deprived of her rights as the residuary legatee under the Will.

We believe this issue to be of utmost importance since it is a basic concept in fact and in law that no man can serve two masters at the same time. No man can serve two conflicting interests at the same time and to permit this situation is to deny petitioner the very safeguards of this amendment. It has been stated that the 14th Amendment is "intended as additional security against the arbitrary deprivation of life and liberty and the ar-

bitrary spoilation of property." * * * And "* * * by 'due process' is meant one which, following the forms of law, is appropriate to the case, and just to the parties affected. It must be pursued in the ordinary mode prescribed by law; it must be adopted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought." *Hager* v. *Reclamation District No. 108*, 111 U. S. 701, 708.

The rules relating to trustees and the prohibition against their serving two masters at the same time, no matter how honest their intentions or sincere their motives, was best enunciated by Mr. Justice Cardozo in the celebrated New York case of *Meinhard* v. *Salmon*, 249 N. Y. 458, where he said as follows:

> "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to be something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions * * *. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court."

In the later case of *In re Hubbell's Will*, 302 N. Y. 245, it was said:

> "In judging the conduct of trustees, the basic consideration is the fiduciary obligation which they owe to all the beneficiaries whom they represent."

It is thus patently clear that Siegel, the executor and evaluator, in serving two diametrically-opposed masters has deprived the petitioner of due process. The issue in this case is not the honesty or integrity of the executor, nor the standard of behavior required of an executor. The services rendered by him in his dual capacity was so contrary to the basic concept of our law that no matter how honest his motives or sincere his intentions, the mere fact that he functioned in the dual roles places petitioner at his arbitrary mercy and denies her due process.

This dual capacity role, if standing alone, would we submit be sufficient to grant Certiorari here. However the harm to the petitioner has been compounded by the Court's failure to give effect to Section 125 of the Decedent Estate Law of the State of New York. That section which is captioned "Limitations on Powers an dImmunities of Executors and Testamentary Trustees", declares:

> "The attempted grant to an executor or testamentary trustee or the successor of either, of any of the following enumerated powers or immunities shall be deemed contrary to public policy: The power to make a binding and conclusive fixation of the value of any asset for purposes of distribution, allocation or otherwise."

Thus the petitioner has been denied equal protection of the laws as guaranteed by the 14th Amendment. In *Hill* v. *Texas*, 316 U. S. 400, this Court said in this regard:

"Equal protection of the laws is something more than an abstract right. It is a command which the state must respect, the benefits of which every person may demand."

This clear enunciation of the public policy of this State condemns the dual capacity in which the executor Siegel acted in complete disregard of petitioner's rights. This Section came into being following the decision in *In re Curley's Will*, 245 App. Div. 255 (2nd Dept. May 1935), affirmed without opinion by the Court of Appeals, 269 N. Y. 548 (Nov. 1935). In that case the testator had given unlimited authority to a fiduciary with a minimum of responsibility or accountability so that an arbitrary determination by the fiduciary could deprive the widow of rights. When the decision of the Appellate Division modified the decision of the Surrogate's Court so that the letter of the law was carried out, a storm of protest arose in the legal profession. This resulted in the passage of Section 125 in 1936. Since the enactment of this Section by the New York State Legislature, widows and orphans have had the protection afforded by this Section. The decision in the cases at bar has set the clock back to the year 1935 and petitioner has been thus deprived of its protection.

Section 125 of the Decedent Estate Law was not merely a statute. It is a declaration of the public policy of the State and a mandate by the State Legislature for the Courts to follow. There is involved in this case not merely the question of a widow's right or the interpretation of a statute. More important is the significance of the binding effect upon the Courts of New York State of the duly declared public policy made and created by the Legislature of this State. Also of importance is the question as to whether the State Courts may ignore or condone circum-

vention of such declared public policy by giving effect to ingeniously contrived mechanisms such as those employed by the testator here. It is submitted that a mandate imposed by the State Legislature declaring the public policy is the law of the State and may not be ignored by the Courts of the State and only this court by certiorari can clarify this issue. It has been held that a State's public policy is to be found in its constitution and laws (*Vidal* v. *Girard's Exrs.*, 2 How. [U. S.] 127) and such declared public policy must be given effect unless it contravenes the State Constitution. The Courts of this State have failed to give effect to this section even though it does not contravene the State Constitution. *People* v. *Hawkins*, 157 N. Y. 1.

While it is true that the decisions of the State Courts are as a general rule accepted by this Court, still this acceptance does not serve to deprive this Court of its inherent power to say that a petitioner is afforded due process. In *Howard* v. *Kent*, 200 U. S. 164, 173 (1905), this Court in passing upon a claimed error in a decision of the State Court, held:

> "We cannot assume error in the decisions of the Court of Appeals. We accept it, as we are bound to do, as a correct exposition of the law of that State—common, statutory and constitutional. Our inquiry can only be, did the State law as applied afford plaintiff in error due process as those words are used in the 14th Amendment?"

And again in *Broad River Power Co.* v. *So. Carolina*, 281 U. S. 537, 540 (1929), this Court stated:

> "Whether the State Court has denied to rights asserted under the local law the protection which the Constitution guarantees is a question upon which the petitioners are entitled to invoke the judgment

of this Court. Even though the constitutional protection invoked be denied on non-federal grounds, it is the province of this Court to inquire whether the decision of the State Court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus evaded. But if there is no evasion of the constitutional issue, and the non-federal ground of decision has fair support, this Court will not inquire whether the rule applied by the State Court is right or wrong, or substitute its own view of what should be deemed the better rule, for that of the State Court."

But it has also been held that questions of due process are not to be treated narrowly or pedantically in slavery to forms or phrases, *Burnet* v. *Wills*, 289 U. S. 670; *Pearson* v. *McGraw*, 308 U. S. 313. Nor is this Court precluded from making its own inquiry in regard to a determination made by the State Court.

It has been held that this Court forms its own independent judgment as to the scope and purpose of a statute even though it may lean to an interpretation which has been placed upon it by the highest Court of this State, *Atchison, Topeka etc. Railroad* v. *Matthews*, 174 U. S. 96, 100 (1898).

The notes of the Legislative Commission which form the basis for the introduction and passage of Section 125 of the Decedent Estate Law by the New York State Legislature, pointed out:

"* * the present bill is intended to cover a much broader field and to protect testators and the objects of their bounty from the untoward effects of ingeniously contrived clauses, the full legal conse-

> quence of which are seldom appreciated at the time of the execution of the wills containing them. The increasing practice of testamentary draftsmen and corporate fiduciaries in vesting in testamentary fiduciaries almost unlimited powers with a minimum of obligations, is a serious potential menace not only to the rights of the surviving spouse, but of the children and other dependents of the testator and of all persons interested in estates. This tendency must be curbed."

Notwithstanding the clear mandate of the legislative enactment as to both the law and the public policy of the State, the petitioner has been deprived of the protection which should have been afforded her.

While it is true that the constitutional protection to which the petitioner is entitled was raised for the first time in the New York State Court of Appeals, this fact alone does not deprive this Court of jurisdiction (*Mallet* v. *North Carolina*, 181 U. S. 589); (*Leigh* v. *Green*, 193 U. S. 79). In *Truax* v. *Corrigan*, 257 U. S. 312, this Court said " * * * this Court as an incident of its power to determine whether a Federal right has been wrongly denied may go behind the finding to see whether it is without substantial support. If the rule were otherwise, it almost always would be within the power of a State Court practically to prevent a review here."

In *Coppage* v. *Kansas*, 236 U. S. 1, this Court pointed out that it will not be restricted in taking cases which merely depend upon the form of the state law, but will hear appeals to this Court in order to enforce the protection of rights secured by the Federal Constitution. Thus, at page 15 it was held as follows:

> "But when a party appeals to this Court for the protection of rights secured to him by the Federal Constitution, the decision is not to depend upon the form of the state law, nor even upon its declared purpose, but rather upon its operation and effect as applied and enforced by the State; and upon these matters this Court cannot, in the proper performance of its duties, yield its judgment to that of the State Court."

It is submitted that there can be no clearer violation of petitioner's rights as guaranteed by the Constitution than those to which she has been subjected in this case. Not only has the State statute and the declared public policy been circumvented, but it is clear that Siegel, the Executor, has acted with a clear conflict of interests. All of this has been condoned by the State Courts. In *In Re Curley's Will, supra*, the Court of Appeals of the State of New York pointed out:

> "While we must assume that the Trustee will act legally, he may act in the interest of those who take the residuary estate, rather than for the benefit of the widow, and thereby frustrate the protection which the statute gives her."

It is clear, we believe, that the Executor, Samuel W. Siegel, could not have in good conscience acted in this dual capacity. If he wanted to be Executor, he should not have been the Evaluator. On the other hand, if he wanted to be the Evaluator, he should not have qualified as Executor. The fact that he was appointed to both capacities by the deceased is of no moment, since it is the declared public policy and clear mandate of the laws of the State of New York that he cannot act in both capacities. The Courts

of the State of New York, having failed to follow the declared public policy of this State and having approved the Executor's actions in his dual conflicting capacities, have thereby deprived petitioner of her rights under the 14th Amendment to the Constitution of the United States.

CONCLUSION

For the foregoing reasons this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

SAMUEL A. SPIEGEL,
Counsel for Petitioner.

Dated: January 2, 1958.

Appendix A

I. 14th Amendment—Sec. 1 (pertinent extract)

"* * * nor shall any State deprive any person of life, liberty or property, without due proces of law or deny to any person within its jurisdiction the equal protection of the laws."

II. U. S. Code Title 28—§1257

"§1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948 c. 646, 62 Stat. 929".

III. Decedent Estate Law of the State of New York.

"§125. Limitations on powers and immunities of executors and testamentary trustees.

The attempted grant to an executor or testamentary trustee or the successor of either, of any of the following enumerated powers or immunities shall be deemed contrary to public policy"

* * * "2. The power to make a binding and conclusive fixation of the value of any asset for purposes of distribution, allocation or otherwise * * *."

Appendix B

OPINION OF SURROGATE'S COURT IN REMOVAL PROCEEDING

April 18, 1951

FRANKENTHALER, J.

"Testator's widow, the residuary legatee under his will, instituted this proceeding to revoke the letters testamentary, to restrain the executor from disposing of certain corporate stock and to obtain the issuance to the petitioner of letters of administration with the will annexed. The hub of the controversy is an agreement, entered into between deceased and his brother, providing for the acquisition by the survivor of them of all the shares of stock of a jointly controlled corporation. This agreement provided, in effect, that upon the death of either brother the survivor might elect to purchase the interest of his deceased brother by payment of one-half of the corporation's net worth as computed in accordance with a method fixed in the agreement, by Samuel Siegel, the accountant for the corporation. The agreement prescribed that the report of net worth be made within thirty days following the death of the deceased and that the survivor exercise his option to purchase within thirty days following the receipt of such report.

Testator died in September, 1949, survived by his brother. Deceased's will nominated his brother and Samuel Siegel as executors but the brother renounced the appointment and Siegel qualified as sole executor. Following deceased's death a report of net worth was prepared by Siegel and thereafter the brother exercised his option to acquire complete control of the corporation.

Early in the affairs of the estate discord arose among persons who are parties herein. The petitioner insisted that her personal counsel be retained as the estate attorney. At one point the executor appeared to acquiesce in this designation but either reconsideration or growing divergencies between the executor and the petitioner prevented any ultimate agreement on this matter. The designation of his attorney was the personal privilege of the executor. Even a testator lacks the power to select the attorney to represent a fiduciary (Matter of Caldwell, 188 N. Y. 115; Matter of Roth, 291 N. Y. 1, 5). It was apparent that one attorney could not represent with propriety both the seller and the purchaser of an estate asset. Equally cogent reasons could exist for the executor's rejection of counsel who also represented a single beneficiary under the will. The refusal of the executor to retain counsel selected by the petitioner does not give her cause for complaint.

Petitioner has not attempted to sustain either her allegation that the agreement between deceased and his brother was invalid as an ineffectual testamentary disposition (cf. McCarthy v. Pieret, 281 N. Y., 407) or her allegation that the executor was duty bound to attack the agreement's validity Nor has petitioner established the agreement to be invalid for any other reason. The court finds that the agreement constituted a binding and enforcible contract at deceased's death (Chase National Bank v. Manufacturers Trust Co., 265 App. Div. 496; Matter of Giebert, N. Y. Law Journal, June 28, 1946). The difficulties between the parties to this proceeding arose in connection with the performance of the terms of the contract following deceased's death and the position now taken by petitioner at the conclusion of the hearing is premised upon the agreement's validity and claimed breaches of its provisions by the executor. The charge

is made by petitioner that the executor's acts were fraudulent, dishonest, wasteful and in violation of his trust duties. The proof does not sustain this charge. The evidence was not sufficient to warrant a finding that the executor's report on the corporation's worth was made later than thirty days after deceased's death and was predated, to represent falsely a compliance with the contract, but, in any event, it is not apparent that any delay in the estate. A delay in the preparation and delivery of the report might have given the prospective purchaser of the report might have given the prospective purchaser of the stock an excuse to avoid the contract and particularly the provisions thereof to be operative in the alternative that the option to purchase was not exercised. The fact is that the purchaser did not assert that the report was delayed and made no attempt to disavow the agreement for any reason, but, instead, complied with the contract requirements by exercising his option within sixty days of deceased's death. In these circumstances it cannot be said that the executor's report was delayed through collusion between the executor and the purchaser in order to permit the latter to claim a breach of the agreement. Certainly the estate could not avoid an unfavorable sale by deliberate delay on the part of the executor. If there was delay, and there appears to have been none, it did not prejudice the estate.

Petitioner asserts that the conduct of the executor in assessing the worth of the corporation is censurable. The pleadings do not present an issue as to the corporation's value. The petitioner states in her memoranda that she does not request the court to determine the net worth of the corporation and that she made no attempt herein to fix that figure and presently is not prepared to do so. In this proceeding the court will determine only the issues presented by the pleadings and tried by the parties (Mat-

ter of Goebel, 263 App. Div. 516; Pattison v. Pattison, 301 N. Y. 65, 68). Any questions as to whether or not the executor may be surchargeable for failure to obtain proper consideration for the corporation stock and the amount of any surcharge may be raised in an accounting proceeding where all interested parties and creditors are before the court upon adequate notice as to the relief sought and available in such a proceeding. The issue now before the court pertains to the removal of the executor.

Following the executor's appraisal of the corporation's worth he obtained, at his own expense, an appraisal by a competent disinterested firm of accountants. The executor may have been prompted to procure this independent appraisal by the critical attitude of petitioner, but nevertheless his doing so was voluntary and commendable. The later valuation was in an amount in excess of that fixed by the executor. The opinions of the parties differ as to whether this difference is attributable to error, distinctions in accounting practices or bad faith. The court finds that the executor did not act in bad faith and that his conduct in this regard does not constitute basis for his removal. This ruling does not exonerate him from responsibility for any omission, mistake, negligence or other act, if any, that may have occasioned pecuniary loss to the estate.

The court also finds that there is not such a conflict of interest as to justify removal of the executor. The executor was selected by the testator not only as a fiduciary but as the person to compute the valuation of the corporate stock. This designation by the testator is of significant importance and must be respected by the court (Matter of Leland, 219 N. Y. 387; Matter of Flood, 236 N. Y. 408; Matter of Ahrens, 193 Misc. 844, 848; Matter of Forte, 149 Misc. 327). Under the inter vivos agreement, the executor, individually, is the escrowee of the

corporate stock until the purchase price shall have been fully paid. Certainly this arrangement does not place the estate in a weaker position than it would be were a third person the escrowee. The executor has been the accountant for the corporation. If he continues in this professional capacity it will afford him an intimate knowledge of the corporation's financial condition at all times. As accountant, the executor will receive compensation from the corporation for services but he will not be controlling the administration of the corporation and he will not be required to exercise any discretion in the corporation's management to the detriment of the estate. It will be to the advantage of both the estate and deceased's brother that the corporation prosper. This situation in which the executor finds himself is one of which the testator was not unaware and it can be said that he contemplated it and created it. The position of the executor as accountant for the corporation does not here create an objectionable condition (Matter of Block, 186 Misc. 945; Matter of Gerbereaux, 148 Misc. 461; Matter of Berri, 130 Misc. 527).

The injunctive relief sought by the petitioner is denied. The duty of the executor to obtain the proper price for the corporation stock, within the terms of the agreement, is clear.

The petition is dismissed. Submit decree on notice."

OPINION OF SURROGATE'S COURT IN CONSTRUCTION PROCEEDING

July 13, 1954

FRANKENTHALER, J.

"Estate of Moe Sherman—Preliminary to the hearing on the objections filed in this accounting proceeding, the residuary legatee seeks a construction of article 4 of the will and article 2, of the codicil of decedent. The residuary legatee claims that the two articles should be declared void and of no testamentary effect. In view of the nature of these provisions of the will and the objections made to the account, the court is of the opinion that a determination at this time of the overall validity or invalidity of these provisions is neither necessary nor useful. If resolution of any issue presented at the hearing in the accounting depends upon the effect of these provisions, such construction as is required will be made at that time. In her petition for construction the residuary legatee has questioned the validity of certain agreements made in 1945 and 1946 between the decedent and his brother. As determination of this issue may help the parties to limit the scope of proof at the accounting hearing and as all interested parties appear herein and have submitted memoranda, the court will direct itself to that issue. In a proceeding in this court in which all parties herein were represented, the validity of these agreements was determined (In re Sherman's Estate, 104 N. Y. S., 2d, 988, aff'd 279 App. Div., 981, leave to appeal denied 279 App. Div., 1065, 304 N. Y. 990). In that proceeding the precise issue of the validity of the agreements was material to the relief requested and was actually litigated by the parties. The court in its written decision, incorporated in the decree, determined

finally that the agreements were valid. The court now holds that the former decision to that effect binds all parties herein (Fulton County Gas & Electric Co. v. Hudson River Telephone Co., 200 N. Y. 287, 296-297; Matter of Welch, 61 Misc. 5; Williams v. Barkley, 165 N. Y., 48; Matter of McGoughran, 124 App. Div. 312, appeal dismised 192 N. Y., 565; Schuylkill Fuel Corp'n 1. Nieberg Realty Corp'n, 250 N. Y., 304; Matter of Cullen, 163 Misc., 410; Berkowitz v. Equitable Life Assur. Soc'y, 21 N. Y. S., 2d, 206; Beakes Dairy Co. v. Berns, 139 App. Div., 733). The hearing on the objections to the account will be heard on the 27th day of August, 1954, at 10 A.M. After these objections have been disposed of, a decree incorporating this preliminary proceeding may be submitted on notice."

OPINION OF SURROGATE'S COURT
ON ACCOUNTING

May 9, 1955

FRANKENTHALER, J.

"Estate of Moe Sherman—Testator and his brother entered into an agreement which provided that upon the death of either the survivor would be privileged to purchase the deceased's stock in the corporation through which they conducted a business. That agreement was attacked by testator's widow in a proceeding which she instituted to revoke letters testamentary and for other relief. The court had occasion to examine that agreement in its decision dismissing the petition in the revocation proceeding (Matter of Sherman, 104 N. Y. S. 2d 988, aff'd 279 App. Div. 981, leave to appeal denied 279 App. Div., 1065, 304 N. Y., 990). Thereafter the executor brought this proceeding for judicial settlement of his account and during its pendency testator's widow instituted a proceed-

ing for construction of the will. Her petition in the latter proceeding asserts that the fourth paragraph of the will and the second paragraph of the codicil are illegal, improper and without effect and that such provisions as well as the agreement entered into between decedent and his brother are void and not binding upon the executor. The court has ruled that its prior decision (supra) is res judicata upon the issue as to the validity of the inter vivos agreement and that the widow's contentions as to the invalidity of such agreement cannot be relitigated (N. Y. Law Journal, July 13, 1954). The latter decision directed that any remaining construction issue be consolidated with this accounting proceeding and be disposed of in conjunction with the objections to the executor's account. Thereafter the widow was permitted to amend her objections to the account.

The widow's petition for construction of the will and her amended objections to the account allege that provisions of the will and the codicil violate public policy by attempting to grant discretion to the executor in the enforcement of the contract between decedent and his brother and by attempting to exonerate the executor from liability for failure to enforce that contract. A construction of the provisions of the will and the codicil is required only to the extent that such provisions are concerned with the performance of the contract. Testamentary provisions cannot operate in contravention of Decedent Estate Law, section 125, to exonerate an executor from liability for failure to exercise reasonable care, diligence and prudence in his fiduciary duties, but the fact here is that the will and the codicil do not attempt either to relieve the executor from his duty to comply faithfully with the terms of the agreement or to prevent any interested party from enforcing the executor's liability for a breach of duty. Furthermore, the testamentary provisions in question can-

not affect the inter vivos agreement for the reason that, irrespective of any testamentary provision, the amount receivable by the estate from decedent's brother in payment for the corporate shares is fixed solely by the agreement and not by the will and the codicil (Matter of Eddy, 290 N. Y. 677; Pailthorpe v. Tallman, 72 N. Y. S. 2d, 784). Neither any provision of Decedent Estate Law, section 125, nor the public policy there expressed has application to a contract or other inter vivos agreement (Matter of Central Hanover Bank & Trust Co. (Momand), 176 Misc., 183, aff'd 263 App. Div. 801, aff'd 288 N. Y., 608). In so far as the testamentary provisions reiterate terms of the agreement such provisions are without significance as it is the contract itself that governs. The court finds nothing in the will invalidating the agreement or affecting its performance in any respect.

The executor has charged himself in his account with a total of $141,581.26 as the amount payable under the agreement and he states that of this amount the sum of $39,052.36 is uncollected. There is no proof that a larger amount was payable under the contract and consequently the executor will be held accountable for the total with which he charges himself.

For the foregoing reasons the court dismisses the widow's amended objections 1, 2, 9, 10 and 11 to the executor's account. Her amended objections 3 to 8, inclusive, were withdrawn at the hearing.

An information schedule in the amount and the brief submitted by the executor at the conclusion of the hearing on objections suggest that decedent's brother be required to pay the amount stated in the account as due from him. The brother has been cited in this proceeding and he has filed objections to the statement in the account that the sum of $39,052.36 is owed by him to the estate. The

prayer of the brother's objections asks that a decree be made adjudging that the amount heretofore paid by him constitutes full payment under the agreement. This objectant participated fully in the trial of the issue as to the amount payable by him, he has filed briefs as to the proper computation of such amount and he has asked the court to fix his liability. No party has raised a question as to the court's jurisdiction to determine such liability.

Litigation as to the validity and enforcement of the agreement between decedent and his brother first arose in the proceeding brought by testator's widow to revoke letters testamentary. Following the widow's unsuccessful effort to remove the executor from office she instituted an action in the Supreme Court against the executor, decedent's brother and the corporation whose shares were the subject matter of the agreement.

The widow asked for judgment (1) determining the net worth of the corporate shares; (2) compelling the individual defendants to account for corporate assets and decedent's assets which she claimed had been fraudulently and collusively disposed of by the defendants and (3) determining the validity of the agreement between decedent and his brother. Motions to dismiss the complaint were granted for the reason that the complaint was grounded upon the allegations that the individual defendants were guilty of fraud, collusion and bad faith, which were the same charges made in the proceeding for revocation of letters testamentary, and the decree in the revocation proceeding was available as a bar not only by the executor but also by decedent's brother who was a party to the revocation proceeding (Sherman v. Siegel, N. Y. L. J., July 19, 1951). The dismissal of the complaint was affirmed (279 App. Div. 981, leave to appeal denied, 279 App. Div., 1064, 304 N. Y. 990).

The instant proceeding is the third occasion upon which issues pertaining to the inter vivos agreement are before a court and it is most appropriate that a determination of all pending issues now be made. It is the court's view that in circumstances jurisdiction to make such determination exists. Matter of Raymond v. Davis (248 N. Y., 67) is a holding that the surrogate has power in an accounting proceeding to direct a partnership liquidation in order that a balance may be struck between the surviving partner and the estate of the deceased partner. That decision was based primarily upon the Court of Appeals' recognition of the broadened jurisdiction of the surrogate but the court also was moved by the fact that the remission of the parties to another forum would involve not only 'oppressive expense' and 'harrowing delay' but would be equivalent to a denial of justice. Inherent in the power to adjust partnership interests is the authority to direct payment by the surviving partner of any balance found to be owed by him to the estate and it would seem to be a proper exercise of the court's authority in the instant case to resolve the rights of the parties in the expectation that further litigation may be avoided. Precedent for such action also is found in Matter of McLaughlin (263 App. Div., 595, aff'd 289 N. Y., 738). In that case an insurance company and a bank asserted a claim against the estate. The claim of the bank was contingent upon its being found liable to the insurance company. The surrogate dismissed the claim against the estate but declined to adjudicate the liability of the bank to the insurance company. The insurance company appealed from the denial of its claim and the bank appealed on the ground that the surrogate had not determined the issue between it and the insurance company. The Appellate Division, commenting that 'all parties submitted their claims to the surrogate, without raising any issue concerning jurisdiction', modified the decree so as to provide that judgment be awarded

in favor of the bank against the insurance company on the merits. The decision of the Appellate Division was affirmed on appeal to the Court of Appeals.

Decedent's brother has agreed voluntarily to pay the estate the sum of $12,956.59 in addition to the amount he previously agreed to pay the executor. He disputes his liability for the full sum of $39,052.38, the amount which the executor seeks to collect from him. The question of liability for such amount depends upon the valuation of the net worth of the business and turns upon the contract provision that the inventory be evaluated at 'cost or market, whichever is lower'. The executor, as the firm's accountant and the person designated in the contract to make an evaluation, regarded market value as the equivalent of replacement value in arriving at the valuation of the inventory. Thereafter he employed a firm of accountants to check his figures. This firm, in accordance with the method recommended by the American Institute of Accountants, considered the phrase 'cost or market, whichever is lower' as intended to provide a means of measuring the residual usefulness of an inventory expenditure so that in an instance where net realizable value reduced by an allowance for an approximately normal profit margin exceeded cost the inventory valuation would be made at cost and not at a lower replacement value. The executor has recognized this method as the correct one and the method he initially employed as erroneous. He has charged himself accordingly in his account. It is held that the figure so arrived at controls in fixing the amount payable under the contract. Objections 1(a), 1(d), 1(e) and 1(g) of Sam Sherman are dismissed. His objections 1(b) and 1(c) were ruled upon in the prior decision herein. His objections 1(f), 3 and 4 do not require rulings. His objection 2 is sustained.

The account of the executor will be settled in accordance with the amendments agreed to at the hearing.

Submit decree on notice consolidating the proceedings and settling the account."

"Opinion by Appellate Division
First Department

By Peck, P. J.; Rabin, Cox, Frank and Valente, JJ.

10045. Matter of Siegel, as ex'r of Moe Sherman, also known as Moses Sherman, dec'd (Sherman and ano., objectors' ap); Matter of Sherman, ap (Siegel, res)—On this appeal, the entire controversy revolves around an inter vivos agreement executed by the testator and his brother in 1945. Both owned all the stock of Sherman Brothers, Inc. The contract provided, in part, that the surviving brother would have the right to acquire the other's stock upon payment to the estate of the deceased brother of a sum to be determined by the net worth of the corporation as calculated by Samuel Siegel, the firm's accountant, who was also named as executor by this decedent. By the terms of the contract, Siegel's determination became final and binding. On two prior occasions, the validity and binding effect of this agreement have been upheld (279 App. Div. 981, leave to appeal to the Court of Appeals denied 279 App. Div. 1064, 1065, 304 N. Y. 990). In our view, the accountant's report of the net worth of the corporation is conclusive except for palpable errors therein. The respondents point to two items wherein they allege such errors were made and which would impose an additional liability upon the objectant Sam Sherman to the extent of $12,956.59. While the named objectant urges that the accountant correctly reflected those items, he is nevertheless willing to pay such sum. The respondents

additionally urge that an error was made by the accountant in the use of an incorrect accounting method in his computations. The method he employed had been used in determining the net worth of the corporation for twenty-five years. We cannot now substitute, as did the learned Surrogate an accounting theory never before used in this enterprise and not generally applied in the industry of which the corporation is a part. Decree unanimously modified by striking the provision therein ordering the objectant to pay the estate the sum of $39,052.26 with interest thereon and substituting therefor a provision requiring the objectant to pay the estate the sum of $12,956.59, without interest and, as so modified, affirmed. Settle order on notice."

ORDER ON REMITTITUR FROM THE NEW YORK STATE COURT OF APPEALS

"At a Surrogate's Court, held in and for the County of New York, at the Surrogate's Office in the City of New York, on the 19th day of August, 1957.

Present: HON. JOSEPH A. COX
Surrogate

ORDER ON REMITTITUR

File #P-2762-49

—o—

In the Matter of the Judicial Settlement of the Account of Proceedings of SAMUEL W. SIEGEL as Executor of MOE SHERMAN, also known as MOSES SHERMAN, Deceased.

IRENE SHERMAN, Objector,

Appellant,

SAM SHERMAN,

Respondent.

In the Matter of the Application of IRENE SHERMAN for a determination as to the validity, construction and effect of disposition of property contained in the Last Will and Testament of MOE SHERMAN, Deceased.

IRENE SHERMAN, Petitioner,

Appellant,

SAMUEL W. SIEGEL, as executor, DAVID I. SHIVIEZ, STATE TAX COMMISSION, STATE OF NEW YORK, JOAN CONSTANCE SHERMAN and VERNON BROS., INC.,

Respondents.

—o—

An appeal having been taken by Irene Sherman to the Court of Appeals from a decree of this Court in the above

entitled proceeding, dated May 31, 1955, and entered in the office of the Clerk of this Court on June 2, 1955, settling and approving the intermediate account of Samuel W. Siegel, as Executor of the Estate of Moe Sherman, deceased, and from the order of the Appellate Division of the Supreme Court, First Judicial Department, dated June 5th, 1956 and entered in the office of the Clerk of said Court on the 8th day of August, 1956, which modified said decree of the Surrogate aforesaid, and pursuant to which a decree, on Remittitur, dated August 14, 1956, was duly entered in this Court on the 24th day of September, 1956, and an order having been duly made and entered by the said Court of Appeals on the 3rd day of July, 1957 affirming said order of modification of the Appellate Division aforementioned, and a certified copy of such order of the Court of Appeals annexed to the papers transmitted from this Court and from the Appellate Division, upon which the appeal was heard, having been transmitted to this Court, now on motion of Davis & Heffner, attorneys for the respondent, Sam Sherman, it is

ORDERED that the order of the Court of Appeals made and entered as aforesaid on the 3rd day of July, 1957, be and the same hereby is made the order of this Court, and it is further

ORDERED that the said respondent Sam Sherman recover his costs and disbursements upon the said appeal as taxed herein, amounting to $277.55 payable out of the Estate.

s/ JOSEPH A. COX
Surrogate"